BROWNWOOD SDN BHD v. LEMBAGA HASIL DALAM NEGERI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[JUDICIAL REVIEW NO: WA-25-9-01-2019]
5 FEBRUARY 2020

ADMINISTRATIVE LAW: *Judicial review – Application for – Certiorari – Seeking to quash decision in rejecting application for refund of stamp duty – Preliminary objection raised – Whether application brought against proper party – Whether application fell within s. 57(f)(i) of Stamp Act 1949 – Whether application caught by provisos (a) and (b) to s. 57 of Stamp Act 1949 – Whether decision illegal or irrational*

REVENUE LAW: *Stamp duty – Refund – Application for – Preliminary objection raised – Whether application brought against proper party – Whether application fell within s. 57(f)(i) of Stamp Act 1949 – Whether application caught by provisos (a) and (b) to s. 57 of Stamp Act 1949*

The applicant entered into a sale and purchase agreement ('SPA') with the vendor in respect of a piece of land ('the land') for the sum of RM15 million. *Vide* a letter, the Pejabat Daerah dan Tanah Gombak informed the parties that the State Authority had approved the transfer of the said land to the applicant. The applicant's solicitors sent the executed memorandum of transfer ('Form 14A') duly executed by the vendor to the applicant. The applicant then issued a banker's cheque in the name of Pemungut Duti Setem amounting to RM540,000 to the solicitors. Form 14A was submitted to the Deputy Collector of Stamp Duties and the stamp duties *ad valorem* was assessed at RM540,000 and the same amount was paid *vide* the stamp duty certificate. Subsequently, another company, Rasa Anggun Development Sdn Bhd ('Rasa Anggun') entered a caveat on the said land on the ground that Rasa Anggun had paid a deposit of RM3,267,000 for the said land. However, Rasa Anggun then withdrew its caveat and the said land was transferred to the applicant. The applicant paid RM2,650,000 to the solicitors towards the purchase price of the said land. When the applicant made three title searches with the land office, the applicant found that the said land had been transferred to Rasa Anggun by the vendor. The applicant then sued the vendor and the solicitors and all its partners for fraud in the sale of the said land. Subsequently, a consent judgment was entered between the parties in the applicant's favour. The applicant then requested the refund of the RM540,000 stamp duty paid to the first respondent, which was rejected by the first respondent on the basis that the application did not fall within ss. 21(7), 57, 58 and 80(3) of the Stamp Act 1949. Hence, the applicant applied for judicial review seeking an order of *certiorari* to quash the first respondent's decision rejecting the applicant's application for a refund of the

stamp duty duly paid and a *mandamus* directing the first respondent to refund the sum of RM540,000 of stamp duty. The applicant submitted that it was entitled for the refund of the said the stamp duty as the stamp duty was executed in respect of Form 14A, but was subsequently found to be useless when the consent judgment was entered which rendered the SPA to be void. As such, the applicant submitted that this case fell within s. 57(f)(i) of the Stamp Act 1949 ('Stamp Act').

Held (dismissing application):

(1) A preliminary objection was raised by the respondents, that was, whether the application was brought against the proper party whose decision was being challenged. Judicial review is the review of the decision making process in which a decision had been made, and in this case, the applicant was seeking to review the decision made by the Deputy Collector of Stamp Duties under the Stamp Act. The first respondent herein was not the decision maker. Therefore, there was merit in the preliminary objection and the substantive application should be dismissed. (paras 14, 18 & 19)

(2) Section 57(f)(i) of the Stamp Act envisages a situation where the instrument is found to be 'absolutely void from the beginning', that is the instrument is '*void ab initio*'. But in the present case, there was no issue of the Form 14A being '*void ab initio*' as the applicant and the vendor had executed a valid transfer for the said land. In fact, the title search conducted by the applicant clearly showed that as at 30 January 2013, the applicant was the registered owner of the said land. It was just that the solicitors and/or the vendor had defrauded the applicant, and the applicant had sued them. From this suit, a consent judgment was entered. One of the consented terms stated that the SPA dated 23 August 2012 was void and of no legal effect. It did not mean that the SPA was void from the beginning (*void ab initio*) but void from the date of the consent judgment. Therefore, the applicant's application for the refund did not fall within s.57(f)(i) of the Stamp Act as the instruments concerned, Form 14A, was not found to be 'absolutely void from the beginning.' (paras 32-35)

(3) In s. 2 of the Stamp Act, the word 'executed' and 'execution' used with reference to instruments not under seal, mean 'signed and signature'. Therefore, in the context of proviso (a) to s. 57, the word 'executed' simply means that the instrument has been signed by both parties. The application for refund herein was made on 31 May 2018 whereas the instrument, Form 14A, was executed by both the applicant and the vendor on 17 October 2012. Since the instrument was executed on 17 October 2012, the application should have been made within 12 months from 17 October 2012. Therefore, the application was clearly

out of time and this court had no jurisdiction to extend time. This application must also be rejected as it fell within proviso (b) to s. 57, in that there was already a legal proceedings that had been commenced, where the instrument, Form 14A, was offered in evidence. As to whether the suit culminated in a consent judgment was irrelevant, as proviso (b) to s. 57 merely required the filing of a suit and the use of the instrument for the purpose of the suit. Premised on the reasons enumerated above, the application did not fall within s. 57(f)(i) of the Stamp Act, and the application was caught by provisos (a) and (b) to s. 57. Therefore, the decision was not illegal nor irrational. (paras 38, 39, 47 & 48)

Case(s) referred to:

Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Central Electricity Board v. Commissioner Of The Federal Capital & Anor; Insurance Company Of North America - Third Party [1967] 1 LNS 14 HC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

DKLR Holdings Co (No. 2) Pty Ltd v. Commissioner of Stamp Duties (NSW) (1982) 40 ALR 1 ***(refd)***

Koperasi Serbaguna Kebangsaan Bhd v. Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur [2003] 8 CLJ 223 HC ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***

Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor [1994] 2 CLJ 249 HC ***(refd)***

T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi [2005] 3 CLJ 302 CA ***(refd)***

Terrance Byrne v. The Revenue Commissioners [1935] lR 664 ***(refd)***

V Sinnathamboo v. Minister For Labour And Manpower [1978] 1 LNS 249 ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 53 r. 2(4)

Stamp Act 1949, ss. 2, 21(7), 57(a), (b), (f)(i), 58, 80(3)

Stamp Duties Management Act 1891 [UK], s. 10

For the applicant - Mohamed Ibrahim Mohamad; M/s Ibrahim & Fuaadah
For the 1st respondent - Zul-Hasymi Mohamad; FC

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi J:

Application

[1] This is the applicant's application for judicial review seeking an order of *certiorari* to quash the first respondent's decision dated 31 October 2018 ("decision") rejecting the applicant's application for a refund of the stamp duty duly paid and a *mandamus* directing the first respondent to refund the sum of RM540,000 of stamp duty.

[2] Having considered the application and the submission of the parties, this court had dismissed the applicant's application with costs.

The Salient Facts

[3] The applicant had entered into a sale and purchase agreement ("SAP") dated 23 August 2012 with Menang Kuasa Sdn Bhd ("vendor") in respect of a piece of land, Lot No. 18059, Rawang, Selangor (the "land") for the sum of RM15m. The applicant was represented by a legal firm, Messrs V Manickam & Partners ("solicitors").

[4] *Vide* a letter dated 15 October 2012, the Pejabat Daerah dan Tanah Gombak had informed the parties that the State Authority had approved the transfer of the said land to the applicant. On 8 November 2012, the solicitors had sent the executed memorandum of transfer ("Form 14A"), duly executed by the vendor to the applicant. On 16 November 2012, the applicant had issued a banker's cheque in the name of pemungut duti setem amounting to RM540,000 to the solicitors.

[5] Form 14A was submitted to the Deputy Collector of Stamp Duties on 18 October 2012 and the stamp duties *ad valorem* was assessed at RM540,000 and the same amount was paid *vide* the stamp duty certificate on 20 November 2012.

[6] On 6 December 2012, another company Rasa Anggun Development Sdn Bhd ("Rasa Anggun") had entered a caveat on the said land on the ground that Rasa Anggun had paid a deposit of RM3,267,000 for the said land.

[7] However, when Rasa Anggun withdrew its caveat on 16 January 2013, the said land was transferred to the applicant on 16 January 2013. A search with the land office made by the applicant on 30 January 2013 also confirmed that the applicant is the registered owner of the said land.

[8] By 14 May 2013, the applicant had paid RM2,650,000 to the solicitors, Messrs V Manickam & Partners towards the purchase price of the said land. When the applicant made three title searches with the land office on 28 October 2013, 20 August 2014 and 18 February 2015, the applicant found that the said land had been transferred to Rasa Anggun by the vendor.

[9] The applicant then sued Menang Kuasa Sdn Bhd, the legal firm Messrs V Manickam & Partners and all its partners for fraud in the sale of the said land in Suit No: 22NCVC-380-07-2018. The Form 14A was filed as a document in the "ikatan dokumen bersama" to be used during the trial.

[10] Subsequently, a consent judgment was entered between the parties on 12 February 2018 where the terms are as follows:

(i) That the SPA between the applicant and Menang Kuasa Sdn Bhd dated 23 August 2012 is void and of no legal effect;

(ii) that the legal firm Messrs V Manickam & Partners and its partners, Vickneswary a/p S Manickam and M Chelvanesan a/l S Manickam, are to refund the applicant the sum of RM2,650,000 with interest at 8%; and

(iii) if Messrs V Manickam & Partners and its partners, Vickneswary a/p S Manickam and M Chelvanesan a/I S Manickam, failed to refund the sum before 12 February 2018, they must pay an additional damages of RM1,500,000.

[11] *Vide* a letter dated 31 May 2018, the applicant requested the refund of the RM540,000 stamp duty paid to the first respondent on 20 November 2012.

[12] In response, the said application for a refund was rejected by the first respondent *vide* an email dated 31 October 2018 on the basis that the application does not fall within ss. 21(7), 57, 58 and 80(3) of the Stamp Act 1949.

[13] Hence, the applicant filed this application to review and to quash the decision of the first respondent and a *mandamus* directing the first respondent to refund the said stamp duty in the sum of RM540,000.

The Findings Of The Court

[14] Before I deal with the merits of the application, I will now deal with the preliminary objection raised by the respondents, that is, whether the application is brought against the proper party whose decision is being challenged.

[15] On this issue, reference is made to O. 53 r. 2(4) of the Rules of Court 2012, which reads:

> Any person who is **adversely affected** by the **decision**, action or omission in relation to the exercise of the **public duty or function** shall be entitled to make the application
>
> (emphasis added)

[16] In the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 the House of Lords held as follows:

> The subject matter of every judicial review is a **decision** made by some person or (body of person) whom I shall call the **decision maker** or else a refusal by him to make a decision
>
> (emphasis added)

[17] In *T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi* [2005] 3 CLJ 302, the Court of Appeal held the principle in judicial review to be as follows:

A Pendapat Mahkamah

Sebelum mahkamah ini mempertimbangkan alasan-alasan rayuan yang dikemukakan peguam perayu, kami berpendapat adalah lebih sesuai jika dinyatakan di sini mengenai prinsip-prinsip yang digunapakai oleh mahkamah-mahkamah dalam pengdalian kes-kes judicial review'.

B Mengenai perkara ini kami ingin merujuk kepada keputusan House of Lords di dalam kes *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141 yang menyatakan:

> Judicial review is not an appeal from a decision **but a review of the manner in which the decision was made**, and, therefore,
C the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable
(emphasis added)

[18] Judicial review is the review of the decision making process in which a decision has been made, and in this case the applicant is seeking to review
D the decision dated 31 October 2018, which was made by the Deputy Collector of Stamp Duties under the Stamp Act 1949 ("Act 378"). The first respondent herein is not the decision-maker.

[19] Therefore, I am of the considered opinion that there is merit in the preliminary objection and the substantive application should be dismissed.

E

[20] On the merits of the application, I refer to the case of *Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor* [1999] 4 CLJ 121; [1999] 3 MLJ 515, where KC Vohrah J had adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. The three grounds
F described by Lord Diplock are:

(i) Illegality;

(ii) irrationality; and

G (iii) procedural impropriety.

[21] By illegality as a ground for judicial review, it means "that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it" and that "... the authority concerned has been guilty of an error of law in its action as for example,
H purporting to exercise a power which in law it does not possess."

[22] By irrationality it means '*Wednesbury* unreasonableness' and "... applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it".

I

[23] By procedural impropriety, it includes "... failure by an administrative tribunal to observe procedural rules that are expressly laid down ..." and "duty to act fairly".

[24] In the present case, the applicant is relying on the ground of illegality and irrationality, premised on s. 57(f)(i) of Act 378.

Whether The Decision Is Illegal And/Or Irrational

[25] The applicant takes the position that its application for the refund is premised on s. 57(f)(i) of Act 378, which reads as follows:

> 57. Allowance for spoiled stamps
>
> Subject to any rules which may be made under this Act and to the production of such evidence by statutory declaration or otherwise as the Collector may require, allowance shall be made by the Collector for stamps spoiled in the following cases:
>
> ...
>
> (f) the stamp used for any of the following instruments:
>
> (i) an instrument executed by any party thereto, but afterwards found to be absolutely void from the beginning;
>
> Provided as follows:
>
> (a) that the application for relief is made within twelve months after the stamp has been spoiled or become useless or in the case of an executed instrument after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed or within such further time as the Collector may prescribe in the case of any instrument sent abroad for execution or when from unavoidable circumstances any instrument for which another has been substituted cannot be produced within the said period;
>
> (aa) that the application for relief is made within two months from the date the instrument of transfer is rejected by the Registrar of Titles; or
>
> (b) that in the case of an executed instrument no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence, and that the instrument is given up to be cancelled.

[26] The applicant submits that s. 57 allows the Collector of Stamp Duties to allow refunds to a person in possession of a spoiled stamp. The word 'spoiled' is not defined in Act 378.

[27] With regard to statutory interpretation, in the case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, the Federal Court has held that:

> **The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment.** ***Prima facie***, evety word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
>
> > As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs J in *Beckwith v. R* [1976] 12 ALR 333, at p. 337.
>
> (emphasis added)

[28] In *Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor* [1994] 2 CLJ 249; [1994] 1 MLJ 156, Edgar Joseph J SCJ stated that although dictionaries are not to be taken as authoritative exponents of the meaning of the words used in the Acts of Parliament, it is a well-known rule that words should be taken to be used in their ordinary sense.

[29] In '*Oxford Advanced Learner's Dictionary of Current English*' (3rd edn), the word "spoiled" is defined to include, *inter alia*, "make useless or unsatisfactory".

[30] This interpretation finds support in the case of *DKLR Holdings Co (No. 2) Pty Ltd v. Commissioner of Stamp Duties (NSW)* (1982) 40 ALR 1, where the High Court of Australia (per Mason J) said as follows at p. 21:

> Section 15(1) enables the Commissioner to allow a refund to a 'person possessed of any spoiled or unused stamps'. Section 15(2) enables the Governor in Council to prescribe, *inter alia*, the classes of cases in which the allowance may be made and the time within which the application for it is to be made. **In the absence of any statutory definition of 'spoiled', I think it should be understood as signifying not only stamps which are defaced, but also those that have become useless** as, for example, when the instrument to which they relate itself 'has failed in its intended operation and has become useless within the meaning of reg 30(7). These words then appropriately apply to a case in which the declarant fails to acquire the property on which the declaration of trust was intended to operate. Of it one can accurately say that it has failed in its intended operation and has become useless. The question arising under proviso (b) to reg 30 - what was the date when the stamp was spoiled? - may in some cases be difficult to determine, but that is not a matter that presently concerns us. (emphasis added)

[31] It is therefore the submission of the applicant that it is entitled for the refund of the stamp duty in the sum of RM540,000, as the stamp duty was executed in respect of Form 14A, the duly executed memorandum of transfer, but was subsequently found to be useless when the consent judgment was entered which rendered the SPA to be void. As such, the applicant submits that this case falls within s. 57(f)(i) of Act 378, and the applicant is therefore entitled for a refund.

[32] However, s. 57(f)(i) of Act 378 envisages a situation where the instrument is found to be "absolutely void from the beginning", that is the instrument is "*void ab initio*". But in the present case, there is no issue of the Form 14A being "*void ab initio*" as the applicant and the vendor had executed a valid transfer for the said land. In fact, the title search conducted by the applicant clearly shows that as at 30 January 2013, the applicant was the registered owner of the said land (see exh. "MSI-9"). This fact is affirmed by the applicant in para. 17 of the affidavit in support, which reads:

> 17. Oleh kerana ketiadaan dokumen asal dalam simpanan Pemohon, saya berikrar bahawa saya telah membuat satu carian persendirian ke atas hartanah tersebut pada 30.01.2013 yang mengesahkan bahawa Pemohon adalah pemilik berdaftar hartanah tersebut.

[33] It is just that the solicitor and/or the vendor had defrauded the applicant, and the applicant had sued them. From this suit, the consent judgment dated 12 February 2018 (exh. "MSI-14") was entered, and the term on the SPA of the said land reads:

> (a) Perjanjian Jual Beli di antara Plaintif dengan Menang Kuasa Sdn Bhd bertarikh 23 Ogos 2012 yang telah disediakan oleh Defendan Kedua, Defendan Ketiga dan Defendan Keempat **adalah batal dan tidak berkuatkuasa**. (emphasis added)

[34] The above consented term simply means that the SPA dated 23 August 2012 is void and of no legal effect. It does not mean that the SPA is void from the beginning (*void ab initio*), but void from the date of the consent judgment, that is effective 12 February 2018.

[35] Therefore, I am of the considered opinion that the applicant's application for the refund does not fall within s. 57(f)(i) of Act 378 as the instrument concerned, Form 14A is not found to be "absolutely void from the beginning".

[36] Added to that, I am also of the considered opinion and I agree with the respondents that the application for refund should be rejected premised on proviso (a) and (b) to s. 57 of Act 378.

[37] Proviso (a) to s. 57 is on time frame to make the application for refund. This proviso (a) allows for relief if application for the same is made:

(i) Within 12 months after the stamp becomes spoilt or becomes useless or in the case of an executed instrument after the date of the instrument; or

A (ii) if it is not dated within twelve months after the execution thereof by the person whom it was first or alone executed or within such further time as the Collector may prescribe in the case of any instrument sent abroad for execution or when from unavoidable circumstances any instrument for which another has been substituted cannot be produced within the
B said period.

[38] In s. 2 of Act 378, the words "executed" and "execution" used with reference to instruments not under seal, mean "signed and signature". Therefore, in the context of proviso (a) to s. 57, the word 'executed' simply means that the instrument have been signed by both parties.

C

[39] In the present case, the application for refund was made on 31 May 2018 (exh. "MSI-15"), whereas the instrument, Form 14A was executed by both the applicant and the vendor on 17 October 2012. Since the instrument was executed on 17 October 2012, the application should have been made within 12 months from 17 October 2012. Therefore, this application is
D clearly out of time and this court has no jurisdiction to extend time. In *Central Electricity Board v. Commissioner Of The Federal Capital & Anor; Insurance Company Of North America - Third Party* [1967] 1 LNS 14; [1967] 2 MLJ 161, the court held that:

E > The Court has no inherent jurisdiction to extend time except where such power is expressly given to it under a provision of the law.

[40] In *V Sinnathamboo v. Minister For Labour And Manpower* [1978] 1 LNS 249; [1981] 1 MLJ 251, the court held as follows:

F > **In the event, I was of the view that the one month time-limit prescribed under section 20(1) of the revised Act was a mandatory provision; and failure to comply was fatal to a workman who was not a member of a trade union**. In my view, that was the most natural interpretation of section 20(1) having regard to the clear words used by Parliament. I further agreed with Mr. Das that Part VI of the Act was an extraordinary relief to a non-unionised workman. If it was the intention of Parliament
G to make the time-limit as a mere directory provision, then it would say so clearly. In the instant case, there was no justification for the court to import words into section 20. (emphasis added)

[41] In *Koperasi Serbaguna Kebangsaan Bhd v. Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur* [2003] 8 CLJ 223, the court held that the time
H frame for refund under Act 378 is mandatory and if the application for refund was made outside the specified time frame, the same must be dismissed. The court held that:

> Furthermore, I am of the view that the plaintiff is not entitled for the refund because of the provisions on time limit for a repayment of the
I stamp duty as specified by s. 58 of the Act. Section 58 provides as follows:

58. Allowance for misused stamps.

> When any person has inadvertently used for an instrument liable to duty a stamp of greater value than was necessary, or has inadvertently used a stamp for an instrument not liable to any duty, the Collector may, on application made within twelve months after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed, and upon the instrument, if liable to duty, being stamped with the proper duty cancel and allow as spoiled the stamp so misused.

The said provision does allow an application for repayment of stamp duty where a person has "... inadvertently used a stamp for an instrument not liable to any duty ...". *But it must be made within 12 months after the date of the instrument. In our present case, the plaintiff paid the stamp duty of RM30,000 on 10 October, 1995 and the application for repayment was made on 6 August, 1997. Clearly, it surpassed the time limit as specified by s. 58 of the Act*. (emphasis added)

[42] The English case of *Terrance Byrne v. The Revenue Commissioners* [1935] lR 664 is also instructive. In this case, the question turns upon the meaning of the words "application must be made within two years after the date of the instrument in s. 10 of the Stamp Duties Management Act 1891 (*pari materia* with s. 58 of Act 378) regarding refund of stamp duty paid inadvertently. The facts in this case is that the instrument was dated 30 January 1932, but was retained as an escrow pending payment of the purchase price, which was paid on 19 May 1932. The instrument was then stamped on 31 May 1932. In fact, the plaintiffs were exempted from payment of stamp duties, and upon discovering this, made an application for refund of the stamp duty on 25 April 1934. The claim was refused by the Revenue on the ground that it was not made within the specified two years period from the date of the instrument. The plaintiffs argued that the correct construction of the words "date of the instrument" is the "date the instrument becomes operative", that is 19 May 1932. However Johnson J held at p. 670:

> The date of the instrument was January 30th, 1932 and I have no power to extend a statutory date of that kind by giving the section a forced and fanciful construction.

[43] The last issue raised by the respondents is that the application should be dismissed as the application is caught by proviso (b) to s. 57 of Act 378. Proviso (b) is applicable in the following circumstances:

(i) There was an executed instrument;

(ii) there was no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence; and

(iii) the instrument is given up to be cancelled.

[44] There is no issue on (i) and (iii), that there was an executed instrument which is given up to be cancelled under the terms of the consent judgment dated 12 February 2018.

[45] The only issue here is whether there was any legal proceedings that has been commenced in which the instrument could or would have been given or offered in evidence. In the present case, there was a legal proceedings that has been commenced, culminating in the consent judgment dated 12 February 2018 (Suit No. 22NCVC-380-07-2015). This suit is against the vendor and the solicitors handling the SPA of the said land for the return of the sum of RM2,650,000 duly paid under the SPA and damages in the sum of RM1,500,000.

[46] On the issue of whether the instrument could or would have been given or offered in evidence in the said suit, this fact had been admitted by the applicant in para 5 of the affidavit affirmed by Mohamad Suffian bin Ismail on 17 April 2019, which reads:

> Saya juga menegaskan bahawa adalah tidak munasabah untuk menyatakan bahawa tempoh 12 bulan sebagaimana diperuntukkan dalam Proviso Seksyen 57 Akta Setem mesti dikira daripada tarikh perjanjian dalam kes ini walaupun seksyen ini membenarkan ianya dikira daripada tarikh setem menjadi rosak atau tidak berguna. *Lebih-lebih lagi dalam kes ini, dokumen yang disetemkan tersebut telah ditawarkan menjadi salah satu bukti untuk dikemukakan dalam prosiding Mahkamah Yang Mulia ini.*
>
> Dilampirkan sesalinan lkatan Dokumen Bersama yang telah difailkan di Mahkamah Tinggi Shah Alam melalui guaman no: 22NCVC-380- 07/2018 yang ditandakan sebagai eksibit 'MSI-1'. (emphasis added)

[47] Therefore, I am of the considered opinion that this application must be rejected as it falls within proviso (b) to s. 57, in that there is already a legal proceedings that has been commenced in Suit No: 22NCVC- 380-07/2018, where the instrument, Form 14A was offered in evidence. As to whether the suit culminates in a consent judgment is irrelevant, as proviso (b) to s. 57 merely requires the filing of a suit and the use of the instrument for the purpose of the suit.

Conclusion

[48] Premised on the reasons enumerated above, I find that the application does not fall within s. 57(f)(i) of Act 378, and that the application is caught by provisos (a) and (b) to s. 57. Therefore, I am of the considered opinion that the decision is not illegal nor irrational and the application is hereby dismissed with costs.